



Kentucky Law Journal

Volume 44 | Issue 4


Article 1

1956

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Recommended Citation

Matthews, W. L. Jr. (1956) "Remnant Gifts Over in Kentucky," *Kentucky Law Journal*: Vol. 44 : Iss. 4 , Article 1.
Available at: <https://uknowledge.uky.edu/klj/vol44/iss4/1>

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Remnant Gifts Over in Kentucky

By W. L. MATTHEWS, JR.*

UNDER COMMON LAW theory of estates in property, future, non-possessory ownership may be created in one person concurrently with present, possessory ownership in another. Both interest holders are owners in the sense that both have a definable estate in the property that fixes their rights and remedies in relation to each other and in relation to third persons. Neither is an absolute owner of the property, however, in any full or practical sense if absolute ownership is taken to mean an *exclusive* unconditional right to do with the property as one sees fit. The very essence of the theory is the fact that ownership may be concurrent and divided while possession remains exclusively with only one of the owners. Moreover, common law dogma provides a very rigid formula for valid creation of present and future interests. The estates known to the law are few in number, no new estates may be created, and the nature of the present interest is primarily determinative of the nature of the future interest coupled with it. Unless the rules and principles designed to maintain the integrity of the formula are followed in creating concurrent but divided ownership, the intent of the grantor or testator may not be legally effective. And even if his expressed intent is allowed to prevail where it fails to conform conceptually, the instrument inevitably presents a difficult construction question when it comes to be interpreted by a court.

Remnant gifts over nearly always create the kind of construction problem just described. They appear most often in homemade wills where the testator, unaware of legal theory, attempts to preserve eventual ownership of family assets in his children or other relatives without denying his widow an unlimited right

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to do with the property as she pleases. Usually the instrument fails to designate technically the kind of present estate or future estate intended and also fails to say expressly whether the first taker shall have the right to make testamentary disposition of the property, a criterion frequently used by the courts to determine if the present interest is a fee simple estate. Since testator's expressed intent is supposed to govern interpretation of his will and since he simply ignores well-entrenched legal principles governing valid creation of present and future estates, the uncertainty of his meaning is actually intensified by the clarity of his words. The most difficult construction problem occurs, therefore, where the will provides in general, unequivocal language that the first taker shall have the property to use, consume or dispose of as he sees fit, but if any portion remains at his death, it shall go to designated persons over. This, in fact, is the typical remnant gift provision with which many courts have struggled, trying to reconcile what testator says with what the law permits.¹

The Kentucky Court of Appeals has shown ingenuity in interpreting remnant gift provisions, especially since its 1948 decision in *Hanks v. McDanell*,² but has not decided categorically whether the gift over can take effect as a remnant future interest even though fee ownership is conferred on the first taker. Under the common law formula for rationalizing the nature of the gift over as a future interest, this question lies at the heart of the interpretation problem. It must be answered before sound, predictable construction of such provisions can be made and before the legal draftsman who is called on to express remnant gift intention can hope to do so with safety. Part I of this article describes existing law inhibiting creation of a remnant future interest after a fee, traces briefly the origin of these rules and suggests a basis for permitting such an estate to exist. Part II evaluates some of the more important recent Kentucky cases interpreting remnant gift provisions.

¹ By far the most complete compilation of cases involving a remnant gift over appears in 17 A.L.R. 2d 1 (1950). This 227 page Annotation exhaustively treats all phases of the problem and surely cites all of the important American and English decisions decided prior to 1950. The total number of decided cases and the wealth of judicial opinion on particular points of construction are good evidence of the very real difficulty the courts have experienced in interpreting remnant gifts over.

² 307 Ky. 243, 210 S.W. 2d 784 (1948).

I

Although of feudal origin, the common law theory of estates in property (referred to herein from time to time as the common law formula, admittedly a deceptive phrase) remains the law today in substantially unmodified form. Certain basic principles, which all lawyers trained in the common law take for granted, form the bedrock of the theory and give it its rigid character. Only those that affect the validity of a remnant gift over need be mentioned here. First, no new estates unknown to the law may be created merely through an expression of intention, although conditions may be imposed on the known estates, and although control of the ownership of property may be conferred by creating a power rather than an estate.³ Second, the known estates, either present or future, achieve their basic nature or character primarily because of the way in which they are created rather than from the proprietary rights which the law attributes to the particular estate.

As a general proposition, the first principle is seldom violated in its application in the cases, but the second seemingly is distorted with some frequency where the court concludes that a particular estate exists because of the proprietary right conferred rather than the form or method of its creation.⁴ The fact remains,

³ A clear concise summary of the principal characteristics of the common law theory is given by Professor Simes in the introductory chapter of his three volume treatise. 1 SIMES, LAW OF FUTURE INTERESTS, SECS. 1-35 (1936) (cited hereafter as Simes). In Section 35 of this chapter Simes points out that in the 17th and 18th centuries the fixed character of the common law estates had developed to the point where it was inconceivable that a person could limit new interests according to his own whim. He aptly illustrates this fundamental feature of the common law doctrine by saying, "When an interest was created, it was forced into one of these categories like sardines in a tin, and made to fit." Sec. 35 at p. 41; In the balance of the cited section the mitigating effect of the common law condition is fully explained. Thus it was quite clear to the common law logician, such as Coke, that the rigidity of estate types could be largely circumvented by the imposition of special limitations or conditions subsequent in great variety. The notion remained, however, that a given interest in land had all the legal characteristics of the estate in the particular category to which it was assigned even when a limitation or condition had been imposed on it. See also *Johnson v. Whiton*, 159 Mass. 424, 34 N.E. 542 (1893) where Mr. Justice Holmes declared, on the authority of Lord Coke, that "a man cannot create a new kind of inheritance."

⁴ As discussed more fully *infra* at p. 411, perhaps the best illustration of this sort of "distortion" is where the court concludes that the present interest is necessarily a fee because the first taker has been given the right to make testamentary disposition. The extreme example of this kind of digression from strict common law doctrine is where a few courts have historically classified a life estate coupled with a general power of appointment as a fee simple. See for instance: *Gibson v. Gibson*, 213 Mich. 31, 181 N.W. 41, (1921); *Van Deventer*

however, that both principles have a direct and vital bearing on the validity of the creator's intent: the first because it confines him to the known concepts in conferring rights of ownership and the second because it requires him to invoke the known concepts through traditional form and expression in creating the estate if he intends to avoid difficulty in the interpretation of his instrument. Thus the beginning law student learns to his amazement that even in the Twentieth Century one who desires to convey or create present, possessory ownership in freehold must create a fee simple or a life estate (or in a few jurisdictions a fee tail),⁵ and one who intends to confer future, nonpossessory ownership can only do this by creating a remainder, an executory interest, or a reversionary interest.⁶ He learns further that the different kinds of future estates cannot be coupled together with any kind of present interest. Thus if the present interest is a life estate (or where permitted, a fee tail), the future interest by definition is a remainder or a reversion depending on whether it is given to a third person or retained by the creator.⁷ But if the present interest is a fee simple, the future interest in a third person is necessarily an executory interest.⁸ Without elaborating the ramifications of the common law formula beyond this oversimplified description, one can begin to see how the uninformed testator entraps himself by giving clear expression to remnant gift intention.

Under the formula, the gift over must take effect either as a remainder or as an executory interest. The nature of the future interest depends on the nature of the present interest: if the first taker has a fee simple, the donee over can only have an executory interest, but if the present interest is a life estate, the gift over necessarily is a remainder. If proper classification of the future interest were merely a matter of terminology, the courts might

v. McMullen, 157 Tenn. 571, 11 S.W. 2d 867 (1928); *Steffey v. King*, 126 Va. 120, 101 S.E. 62 (1919); *Ogden v. Maxwell*, 104 W. Va. 553, 140 S.E. 554 (1927). 2 SICES, Sec. 598 concludes that all of these cases have now been repudiated either by statute or later court decision.

⁵ 1 AMERICAN LAW OF PROPERTY, Sec. 1.42 (1952); 1 RESTATEMENT, PROPERTY 201 (1936); 1 SICES, Sec. 37 (1936).

⁶ 1 AMERICAN LAW OF PROPERTY, Sec. 4.5 (1952); 1 SICES Sec. 39 (1936); the term reversionary interest is used here to include the reversion, the possibility of reverter and the right of reentry or power of termination. This is the terminology of the Restatement and is used frequently to avoid repetitious enumeration. See 1 RESTATEMENT, PROPERTY, Secs. 154, 155 (1936).

⁷ 1 SICES, Sec. 39 (1936).

⁸ *Ibid.*

easily graft an exception on to the traditional theory and give effect to the testamentary intent apart from minor distortion in labels. But the *nature* of the gift over as a future interest is more fundamental to solution of the construction problem than the question of what it should be called. A remainder after a present fee is invalid because the former has been considered repugnant to the latter since feudal times.⁹ Moreover, many courts deny validity to an executory interest following a fee if it is conditioned on failure of the first taker to dispose of the property.¹⁰ Such condition is the *sine qua non* of a remnant gift over. From the practical viewpoint, therefore, existing law denies validity to the only two kinds of future interests available under traditional estate doctrine for giving effect to remnant gift intention. This then is the underlying and often unrealized construction dilemma created by a testamentary provision for remnant gift over: shall legal doctrine be modified to permit creation of a strange future interest or one that is traditionally invalid, or shall testator's intent be made to conform through interpretation or implication?

On the whole, American courts have taken the second approach. They consistently hold the gift over void if testator intends to confer absolute ownership on the first taker in the form of a fee simple estate.¹¹ This result is manifestly unsatis-

⁹ Harder v. Matthews, 309 Ill. 548, 141 N.E. 442 (1923); Blackstone describes the repugnancy of fee and remainder in these terms: "no remainder can be limited after the grant of an estate in fee simple: (b) because a fee simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate; a remainder therefore which is only a portion, or *residuary* part, of the estate, cannot be reserved after the whole is disposed of." 2 BLACKSTONE'S COMMENTARIES 164; the classical treatment of the origins of the remainder and its repugnancy to a fee is in 2 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW (2d Ed.) 21 *et seq.* (1911).

¹⁰ The earliest American decision on the point probably was Ide v. Ide, 5 Mass. 500 (1809) although the opinion of Chancellor Kent some ten years later in Jackson v. Robins, 16 Johns (N.Y.) 537 (1818) is frequently described as the origin of the doctrine. The great number of decisions which support the general proposition that a valid executory interest cannot be conditioned on disposal by the first taker are assembled in Sections 5, 9 and 14 of the A.L.R. Annotation, *supra*, note 1. For a particularly clear and categorical assertion of the principle see: Galligan v. McDonald, 200 Mass. 299, 86 N.E. 304 (1908); Parker v. Powledge, 198 Ala. 172, 73 So. 483 (1916); Sayre v. Kimble, 93 N.J. Eq. 30, 114 A. 744 (1921); Starkan v. Ziska, 406 Ill. 259, 94 N.E. 2d 185 (1950).

¹¹ Combs v. Combs, 172 Ark. 1073, 291 S.W. 818 (1927); Bradford v. Martin, 199 Iowa 250, 201 N.W. 574 (1925); Re Wadsworth, 176 Minn. 445, 223 N.W. 783 (1929); Peyton v. Smith, 213 N.C. 155, 195 S.E. 379 (1938); Whitehead v. Whitehead, 174 Va. 379, 6 S.E. 2d 624 (1940); Pirtle v. Kirkpatrick, 297 Ky. 785, 181 S.W. 2d 425 (1944); Bennett v. Bennett, 193 Misc. 553, 81 N.Y.S. 2d 653 (1948).

factory because it fails completely to achieve the expressed testamentary intent. If testator intends to give the first taker a life estate only, the gift over is sustained as a valid remainder in fee, but the life estate is supplemented with an express or implied power to use, consume or dispose.¹² This construction is unnecessarily awkward and usually requires substantial distortion of the explicit wording of the instrument. Apart from this, however, the question inevitably arises whether the power is limited or unlimited, both as to testamentary disposition and as to testator's intended criteria for exercise of the power. Although this interpretation solves the validity of the gift over, it opens up a Pandora's box of litigable construction questions about the power and requires the court to foresee all of the exigencies of family need and desire which may trigger its legal exercise.¹³ Of equal consequence to the legal draftsman is the high premium this approach places on thorough familiarity with the latest specific utterances of the court concerning the scope of such powers. In fact, only a cursory examination of the cases will show that few draftsmen and no unadvised testators can anticipate how the power coupled with the life estate will be interpreted. The only certainty seems to be that every remnant gift provision involving disposition of property of sufficient value to warrant suit must be litigated.

It is surprising to find so little judicial attention given to the alternative approach of re-examining and modifying legal doctrine. In looking for a way out of the construction dilemma, it

¹² *Otis v. Otis*, 104 Kan. 88, 177 P. 520 (1919); *Keiser v. Jensen*, 373 Ill. 184, 25 N.E. 2d 819 (1940) (overruling *Sweet v. Arnold*, 322 Ill. 597, 153 N.E. 746 [1926] requiring the power to consume to be express); *Hanks v. McDaniel*, 307 Ky. 243, 210 S.W. 2d 784 (1948); *Glidewell v. Glidewell*, 360 Mo. 713, 230 S.W. 2d 752 (1950); *Collings v. Collings' Ex'rs.*, 260 S.W. 2d 935 (Ky. 1954) commented on 42 Ky. L.J. 717 (1954).

¹³ Professor Ralph Norvell has described these exigencies in great detail and with considerable imagination: Norvell, *The Power to Consume: Estate Plan or Estate Confusion*, 28 MICH. STATE B.J. 5 (1949). The writer concludes this article by pointing out "The only policy argument which supports the toleration of a device (life estate coupled with power to consume) which is so likely to lead to confusion and wasteful litigation lies in the idea that every owner should be allowed to dispose of his property in the manner he chooses so long as no affirmative rule of law is violated. Perhaps this gives to the owner of the small estate, which cannot support a more elaborate settlement, a claim upon the legal system to provide for him a method (albeit beset with some uncertainty) by which he may provide financial security to the immediate objects of his bounty and yet control the devolution of title through the maximum period allowed by the law."

would seem logical to rationalize the remnant gift over as a remnant future estate designed to become possessory if the first taker does not exercise his fee ownership by disposing of the property. As already pointed out, the historical repugnancy of a remainder after a present fee and the traditional invalidity of an executory interest conditioned on failure of the fee owner to dispose are the related bits of classical learning that bar this path. Because of their amazing vitality in our legal lore, they cannot be ignored or changed summarily; they must be examined and evaluated to see if they are immutable or serve any useful modern purpose.

The incompatibility of a present fee and a remainder rests on the notion that a fee simple absolute is the maximum estate of ownership known to the law. The remainder developed at common law as a future interest designed to become possessory after a present estate less than a fee. The classic example is "to A for life, then to B in fee." B, the remainderman, is entitled to possession when the preceding estate of limited duration "expires."¹⁴ Since a fee is an estate of unlimited duration and never expires of its own terms, once it is created there are no rights of ownership—no future estate—to be conferred over by way of remainder. Although the repugnancy of fee and remainder may be thought of as an historical anachronism which places form above substance, there is no real prospect that common law estate theory will be modernized soon to permit creation of a "remnant remainder" after a present fee. To do so would require too severe a change in the classical concept of a fee.

The repugnancy of fee and remainder never existed historically between a fee and an executory interest. In contrast to the remainder, an executory interest is designed to vest and become possessory in derogation of a fee,¹⁵ and its creation is thoroughly compatible with absolute (but non-exclusive) ownership in the first taker. The classic example is "to A in fee, but if A die without issue, to B in fee." The difference between the two types of future interests historically was more than a matter of form, however. The remainder originated in the early common law as a legal future interest subject to the various prohibitions at law

¹⁴ 1 SIMES, Sec. 51, p. 73 (1936).

¹⁵ *Id.*, Sec. 154, p. 275.

against transfer of seizin *in futuro* while the executory interest originated as a springing or shifting equitable use and could not be created as a legal future estate until after the Statute of Uses.¹⁶ Although contingent by nature, the executory interest was not subject to the common law rule requiring timely vesting of contingent remainders, either before or after the Statute of Uses.¹⁷

Because of the fundamental difference between the remainder and the executory interest traceable to their different origin, no *inherent* characteristic of the modern executory interest prevents its use for remnant gift purposes. In fact, it probably is just the kind of future interest testator would intend to create if he were informed technically about such matters. In most cases, if his expressed intention has any technical meaning at all, he intends to create fee ownership in the first taker followed by fee ownership in the donee over, contingent on first taker not fully exercising his ownership by consuming or disposing of the property. Unless an executory interest so conditioned is invalid because it violates some basic legal policy, this clearly is the best rationalization of the remnant gift over because it requires no change whatever in common law or modern theory of future estates.

The traditional invalidity of a remnant executory interest seems not to rest on policy considerations primarily, although such a future interest is referred to in some cases as inconsistent with present fee ownership.¹⁸ Rather it is traceable to the influence of a very questionable decision by Chancellor Kent in *Jackson v. Robins*¹⁹ at the beginning of the 19th century. In striking down an executory interest conditioned on failure of the fee owner to dispose, Kent relied on *Pells v. Brown*²⁰ the famous 17th century decision of the King's Bench establishing the "indestructibility" of executory interests. Kent reasoned that if an executory interest was indestructible it could not exist subject to any condition permitting the fee owner to destroy it. Thus if the first taker had unlimited power to dispose of the property in fee and could prevent the executory interest from vesting by exercising this

¹⁶ *Id.*, Sec. 149, p. 268.

¹⁷ *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Reprint 504 (1620); 1 SIMES, Secs. 97-98, p. 164 *et seq.* (1936).

¹⁸ *Van Horn v. Campbell*, 100 N.Y. 287, 3 N.E. 316 (1885); *Clay v. Chenault*, 108 Ky. 77, 55 S.W. 729 (1920); 3 SIMES, Sec. 595, p. 526 (1936).

¹⁹ 16 Johns (N.Y.) 537 (1818).

²⁰ Cro. Jac. 590, 79 Eng. Reprint 504 (1620).

right, the gift over was necessarily void; otherwise it would be destructible at the hands of the first taker.

Kent's view of the scope of the doctrine of indestructibility and his application of it to the remnant gift over would have been meaningless to the King's Bench at the time of *Pells v. Brown*. In that case the English Court simply held that an executory interest, although contingent, could not be destroyed by common recovery since it was not subject to the rule that a contingent remainder must vest at or before the expiration of the preceding freehold estate. In other words, since an executory interest is preceded by a fee estate of unlimited duration which cannot be terminated prematurely by tortious conveyance or merger, it was not destructible at common law in the way a contingent remainder could be destroyed. In this sense and this sense only, *Pells v. Brown* classified the executory interest as indestructible and preserved it from attack at a time when the destruction of contingent remainders was common practice. In no sense does *Pells v. Brown* stand for the general proposition that any executory interest is void where the owner of the fee has power to prevent it from vesting by performance of a condition.

Professor Simes has made perhaps the clearest explanation of the misconception implicit in Kent's application of *Pells v. Brown* to the remnant executory interest. He points out:

... the fallacy in Kent's argument is in the use of the word 'destructible' to mean two different things. What *Pells v. Brown* meant was that an executory interest could not be defeated by common recovery and the intent of the testator thus frustrated. But an executory devise after an absolute gift to the first taker, coupled with power of disposal, is not destructible in that sense. It is destructible in the sense that according to testator's intent, it may fail to take effect if the power is exercised because testator so provided.²¹

Simes' point that testator actually intends for the remnant executory interest to be destroyed if the owner of the fee exercises his right to dispose is most important because this is the precise point which many courts have ignored in following Kent's dictum blindly. They seem unaware that any executory interest may not take effect in the sense that it will fail to vest and become

²¹ 3 SIMES, Sec. 595 at p. 525 (1936).

possessory if the condition precedent on which it is created fails to occur. By generalizing Kent's misconception into a rule of law, such cases hold in effect that testator cannot select the first taker's failure to dispose as a valid condition precedent. No sound or historical reason exists why any future interest should be void merely because the contingency is controlled by the owner of the present estate, and normally one may impose any condition precedent he chooses, provided of course the rule against perpetuities is not violated. Thus a remainder or an executory interest contingent on failure of the possessory owner to have issue, to remain unmarried or to pay money is perfectly valid.

Apart from the influence of Kent's dictum there is little traditional objection to a remnant gift taking effect as an executory interest except perhaps a deep-seated feeling that all remnant gifts over are inconsistent with full ownership in the first taker regardless of the kind of future interest created. It is said sometimes that a gift over after a fee denies one of the principal attributes of fee ownership to the first taker—the right to dispose of the property in fee; and other reasons for voiding the gift are offered occasionally.²² In final analysis all the reasons are merely variations on the theme of repugnancy. As already shown, this doctrine at best is an historical anachronism applicable only to the remainder after a present fee. It never existed in any true conceptual sense between the fee and the executory interest and should not be extended or perpetuated where it is unnecessary to maintain the integrity of sound future interest definitions.

Unless a court is prepared to hold as a matter of law that a testator cannot alter the traditional scheme for ultimate devolution of title to his property by creating a remnant executory interest, the only problem raised by the typical remnant gift over is whether the will shows adequate intent to create the proper

²² Professor Simes summarizes the various reasons given by the Courts as follows:

"... (a) According to the argument suggested in *Guilliver v. Vaux*, the gift over is bad because by no possibility could the heir take, not by will because one cannot devise to his heir, not by descent, because, were the gift over valid, it would take effect on intestacy to defeat the heir; (b) as to personalty, the gift over is bad because it is too indefinite; (c) the gift over is bad because executory devises are necessarily indestructible by any act of the holder of the preceding estate; (d) the gift over is repugnant to the prior absolute gift; (e) the gift over deprives the fee simple estate in land or absolute interest in personalty of one of its necessary incidents, namely, that it will pass to heirs or personal representatives on intestacy." 3 *SIMES*, Sec. 595, p. 523 (1936).

kind of future interest. In these terms, testator's intention is unenforceable only if he purports to create a remnant gift in the form of a contingent remainder after a present fee. Since he seldom if ever specifically identifies the nature of the gift over as a future interest, his whole will can be interpreted without distortion of its plain meaning to create a remnant executory interest conditioned on failure of the first taker to dispose.

The main advantages of this rationalization for the remnant gift over are at least two. First, it permits the express, literal intent of the testator to have maximum legal effect without any violation to traditional or logical application of common law estate theory. Second, and more important, it eliminates the most perplexing phase of the construction problem by making it unnecessary to speculate whether testator intended to create a fee or a life estate in the first taker. The intent to create a present fee may be conceded without jeopardizing the validity of the gift over. This in turn reduces the need for implying a power of disposal in the first taker as life tenant and minimizes, but does not eliminate entirely, implications concerning the scope of first taker's right to dispose of the property.

When viewed in the manner suggested, the legal consequences of remnant gift intention are soundly explained. The first taker has full (but not exclusive) ownership in the form of a possessory fee simple subject to an executory interest over contingent on the first taker failing to consume or dispose of the property, either *inter vivos* or by will. Under this kind of "ownership" the first taker has full right to use and possess the property during his life time without liability to the donee over, and he can transfer the property in fee simple free of the executory interest. If testator does not intend to confer unlimited right to use or dispose, his language can be construed accordingly and the executory interest will vest when the terms of the condition are met. Pending disposal in fee or consumption of the property through use, the donee over, as owner of the executory interest, has a right to future possession of the property which he will realize on if the first taker does not consume it or dispose of it. His future interest is alienable and devisable and should he die intestate before the first taker dies, it will descend according to the laws of descent and distribution like any other contingent future in-

terest. Moreover, it would not be a sound argument to contend that the holder of the remnant executory interest really has no interest or estate of value unless there is certainty his future ownership will become possessory. Modern theories of future ownership have long since developed to a point where it is quite clear that one may have a valid, valuable, existing right to future possession that may never become possessory either because the condition precedent to its vesting never occurs or because the property itself is not in existence when possession materializes. Finally, there could be no question about the validity of the remnant executory interest under the rule against perpetuities since the contingency must occur within the life of the first taker, a life in being at the time the interest is created.

In all probability the legal consequences described are precisely those testator would have intended had he been aware of the conceptual and construction questions raised by the language used in his will. This alone should be ample reason for judicial recognition of the suggested rationalization since the courts are properly committed to the notion that clear and unequivocal testamentary intent must prevail unless it contravenes some immutable policy in the law.

II

The Kentucky Court treats the validity of a remnant gift over as a matter of construing the will and this probably accounts for its failure to express any clear view concerning the validity of a remnant executory interest contingent on first taker failing to dispose. In all of the modern cases the court has attempted to solve the construction problem on the assumption that any gift over after a fee is invalid. This approach, as already suggested, makes the meaning of the instrument most difficult to reconcile not only because of the inconsistencies within the will but because it is virtually impossible to apply well established principles of construction to varying language in each will with reasonable consistency.

Three broad rules of construction have been relied on in the cases, however, and seem to serve as the court's frame of reference in most cases. First, the decisions repeatedly assert that the intent of testator governs in a remnant gift will as in all other

testamentary interpretations.²³ If taken too literally, this maxim is not very helpful since it really amounts only to an explanation for the conclusion reached after other construction principles are applied. Apparently in no instance has the court followed the rule so literally as to uphold a remnant gift over without regard for the law or the way in which the intention is expressed. Looking to the intent of the testator is simply a main guide post that permits the court to give effect to what it thinks the testator intended, based on what he said or did not say in his will, and based also on the intent any testator might have expressed had he anticipated the legal question in issue. When understood in this light, the rule serves a very useful purpose in interpreting remnant gifts because it enables the court to justify a conclusion that testator intended to create the proper kind of present and future interest. This reduces to some extent the inherent conflict between the express wording of the will and existing legal doctrine.

Second, Kentucky decisions since 1948 have established the firm construction principle that testamentary intent in a remnant gift will must be derived from the instrument as a whole.²⁴ Before the decision in *Hanks v. McDanell*²⁵ this "polar star" rule had been applied to all wills except those purporting to create a gift over after a fee. The latter had been governed by the "biting rule," a principle quaint in logic as well as name.²⁶ This rule rested on the assumption that primary intent always is expressed in prior provisions of the will. Thus if testator conferred fee

²³ *Greenway v. White*, 196 Ky. 745, 246 S.W. 137 (1922); *Phelps v. Stoner's Adm'r.*, 184 Ky. 466, 212 S.W. 423 (1919); *Watkins v. Bennett*, 170 Ky. 464, 186 S.W. 182 (1916).

²⁴ *Wiglesworth v. Smith*, 311 Ky. 366, 224 S.W. 2d 117 (1949); *Swango v. Swango's Adm'r.*, 313 Ky. 495, 232 S.W. 2d 347 (1950); *Hall v. Hall*, 314 Ky. 733, 237 S.W. 2d 55 (1951); *Collings v. Collings' Ex'rs.*, 260 S.W. 2d 935 (Ky. 1953); *St. Joseph Hospital v. Dwertman*, 268 S.W. 2d 646 (Ky. 1954); 40 Ky. L.J. 350 (1952); 42 Ky. L.J. 717 (1954). Even prior to 1948 the Court of Appeals had taken notice of the fact that adherence to the old rule had in given cases defeated the intent of the maker of the will. See the candid opinion in *Berner v. Luckett*, 299 Ky. 744, 186 S.W. 2d 905, 906 (1945).

²⁵ 307 Ky. 243, 210 S.W. 2d 784 (1948).

²⁶ A full history and description of the biting rule and its application is given in the opinion in the *Hanks* case. The history of the rule also is elaborately described in *United States v. 711.4 Acres of Land, More or Less, Situate in Clinton and Russell Counties, Kentucky*, 107 F. Supp. 62 (W.D. Ky. 1952). For comparatively recent but pre-1948 decisions applying the historical rule, see: *Pirtle v. Kirkpatrick*, 297 Ky. 785, 181 S.W. 2d 425 (1944); *Wells v. Jennell*, 232 Ky. 92, 22 S.W. 2d 414 (1929); *Jackson v. Ku Klux Klan*, 231 Ky. 370, 21 S.W. 2d 477 (1929).

ownership on the first taker in a prior part of the will, he could not reduce this interest to less than a fee by providing for a seemingly inconsistent gift over in a later part of the instrument. Although simple to apply, this test ignored the fact that separate parts of a will are frequently inconsistent in fact and also that no logical reason exists for preferring one clause over the other merely because it is written first.

Under the modern rule or the historical rule, attention is focused on the estate testator intends to create in the first taker, but the effect of the rules on the validity of the gift over is strikingly different. Under the biting rule the nature of the present estate is governed entirely by the words appearing in the clause that creates it. In most cases this will insure the invalidity of the gift over since the clause creating the present interest usually is worded so broadly as to point to a fee. If the intent is derived from the whole instrument, however, the subsequent provision for gift over is an important factor in determining whether the prior clause creates a fee. As will be seen, this factor may not be decisive, but the fact that it can be considered at all is an important step in seeking the "actual" intent of testator. Although the rule of the *Hanks case* is infinitely harder to apply, it does supply much-needed leeway in reconciling literal testamentary language with known legal principles. In one sense it widens the area of conflict by bringing to bear all that testator said, but it also widens the base for expression of legally effective intent and creates need for more specific principles of construction designed to make sense out of the whole instrument. Potentially it frees the court from the necessary implication under the biting rule that any gift over after a fee is inherently repugnant to absolute ownership in the first taker.

A third general construction principle is used in remnant gift cases although it obviously is of different rank from those already discussed. The Kentucky court has held repeatedly that an absolute fee is bestowed on the present owner when he is given an unlimited right to dispose broad enough to include testamentary disposition.²⁷ In other words, as a matter of construction

²⁷ *Collings v. Collings' Ex'rs.*, 260 S.W. 2d 935 (Ky. 1953); *Berner v. Luckett*, 299 Ky. 744, 186 S.W. 2d 905 (1945); *Pirtle v. Kirkpatrick*, 297 Ky. 785, 181 S.W. 2d 425 (1944); *Wells v. Jennell*, 232 Ky. 92, 22 S.W. 2d 414 (1929); *Sisson v. Sisson*, 208 Ky. 843, 272 S.W. 15 (1925).

the right to dispose in fee by will is the ultimate criterion of the nature of the first taker's estate. This in turn governs the validity of the remnant gift over since it cannot follow a fee. However logical this view may seem to be when standing alone, it requires the conclusion, under existing law, that a gift over following a present interest is invalid where the owner of the present estate has the right to dispose of the property in fee by will. The conclusion like the premise seems to ignore the fact that the testator may have intended actually to give the first taker a fee simple subject to a remnant executory conditioned on failure of the first taker to dispose either *inter vivos* or by will. Fortunately the Kentucky Court in its most recent decisions has applied the rule negatively. They have used it as a basis for implying from the particular wording of the will that testator did not intend to give first taker a right of testamentary disposal. To attribute this meaning to what he said prevents his gift over intention from taking effect. Therefore, as the Court inferred very clearly in *Collings v. Collings' Ex'or.*,²⁸ the gift over shows that testator did not intend for the first taker to have unlimited right to dispose of the property. In fact the *Collings case* seems to restrict the scope of the power even though it is exercised before death and this position has been reaffirmed in *St. Joseph Hospital v. Dwertman* where the Court identified the first taker's interest as "a consuming life estate."²⁹ Suffice it to say at this point, the Kentucky cases are committed to the proposition that one who has the right to control devolution of title by will owns in fee.

In so far as the creation of a fee is a question of construction, the Kentucky rule is a major departure from strict common law theory. Historically the only emphasis was on magic words of limitation used to denote the duration of the estate. Thus a fee simple estate could be created only where the conveyance or devise was "to A and his heirs" and a life estate arose only if the transfer was "to A for life." Without these meaningful words no estate of any known character was created; conversely, the nature of the estate and the extent of right thereunder were fixed by their use. Since the nature of the estate fixed the scope of the right, any alteration in the traditional proprietary power

²⁸ 260 S.W. 2d 935, 937 (Ky. 1953).

²⁹ 268 S.W. 2d 646, 648 (Ky. 1954).

commensurate with the estate was achieved by imposing conditions on it or by subjecting it to the exercise of a power. These conditions and powers, however broad in scope, did not alter the nature of the estate; they merely existed in all their dignity as appendages to the feudal estates.

Much of the particular doctrine just summarized has lost its vigor in modern application, and properly so, but not all of it has been discarded. Specific words of limitation are no longer necessary to create a fee simple estate³⁰ and it is generally recognized that the kind of estate created should depend on the incidents or attributes of ownership conferred. On the other hand, the historical notion that the nature of one's ownership is not changed by imposing a condition on the estate or subjecting it to a power remains unchanged. Thus a fee simple estate to exist so long as the property is used for a particular purpose is a determinable fee and confers full proprietary rights until breach of the condition.³¹ Similarly, a life tenant who has a general power to appoint the property in fee is still a life tenant in the sense that his life estate can be followed by a future interest, a future estate, incidentally, that is universally classified as vested rather than contingent.³² This feature of modern estate theory is most important in construing remnant gift provisions because it explains legally how testator may intend to confer fee ownership on the first taker, including the right to dispose in fee by will, and still intend to confer eventual ownership over on the happening of a stated condition or event: failure of the first taker to dispose.

Thus whether the validity of a remnant gift over is determined as a matter of law or as a matter of construction, the vital question remains: is there any legal policy to prevent valid creation of a remnant executory interest following a fee conditioned on failure of the fee owner to dispose? Translated into the construction context of the Kentucky cases, the question becomes: although the first taker has a fee if he has a right to make testamentary disposition, does it necessarily follow that a gift over

³⁰ I AMERICAN LAW OF PROPERTY, Secs. 2.3, 2.4, and 2.5, pp. 83 to 95 (1952). The text in the sections cited is very completely documented both as to the historical rule requiring use of the word "heirs" and as to the modern statutory and case law on the point in each of the forty-eight states.

³¹ *Id.*, Sec. 2.6, 94; RESTATEMENT, PROPERTY, Secs. 44, 49 (1936).

³² 1 SIMES, Sec. 80, 134.

conditioned on failure to so dispose cannot take effect as a remnant executory interest? Except for the authority based on Kent's dictum discussed earlier,³³ sound application of strict common law theory requires a negative answer to this question. The only difficulty in Kentucky is that the Court of Appeals has failed to consider the question directly, and much of what it has written and decided in the more important cases seems to reflect the view that a remnant gift over cannot follow a fee. In fact, the absence of direct and unequivocal authority on the point suggests that the Court's position is retrievable.³⁴ It may be helpful, therefore, to evaluate the important Kentucky cases decided since 1948 from this viewpoint.

Beginning with the Hanks case in 1948, the Kentucky Court has decided nine comparatively recent cases that are of significant importance in determining the validity of remnant gift provisions. Although the gift over was sustained in six of these cases,³⁵ it is quite clear in all but one of them³⁶ that this decision was reached on the theory that a remnant gift provision reduces the first taker's interest to a life estate. The gift over was construed to be void in two of the other three cases, but not for reasons germane to the thesis of this discussion. In one, the particular will became operative before the new rule of construction established in the Hanks case was supposed to become effective.³⁷ In the other case, the gift over was provided for in precatory language and the Court correctly held that it was unenforceable,

³³ See discussion *supra*, p. 404 *et. seq.*

³⁴ Sparks, *Future Interests*, 1954 *Annual Survey of American Law*, 655 at 662; But see: 42 Ky. L.J. 717, 723 (1954).

³⁵ Hanks v. McDanell, 307 Ky. 243, 210 S.W. 2d 784 (1948). Noted 40 Ky. L.J. 350 (1952); Jacobs v. Barnard, 307 Ky. 321, 210 S.W. 2d 972 (1948); Hall v. Hall, 314 Ky. 733, 237 S.W. 2d 55 (1951); Weakley v. Weakley, 237 S.W. 2d 524 (Ky. 1951); Collings v. Collings Ex'rs., 260 S.W. 2d 935 (Ky. 1953); St. Joseph Hospital, Lexington v. Dwertman, 268 S.W. 2d 646 (Ky. 1954).

³⁶ Hall v. Hall, 314 Ky. 733, 237 S.W. 2d 55 (1951).

³⁷ Stewart v. Morris, 313 Ky. 424, 231 S.W. 2d 70 (1950). The opinion in this case admits that the Court mistakenly applied its new rule of construction retroactively in both the Hanks case and the Jacobs case, decided in the same term, since both wills became effective before the actual date of the Hanks opinion which was intended to be of prospective effect only. The particular problem was settled conclusively in the Stewart opinion which stated expressly that no will should be governed by the Hanks case unless the testator died after April 23, 1948, the precise date of the Hanks opinion. Interestingly enough the suggestion has not been made in any case that the Hanks rule should govern only those wills *written* after the above date. Apparently the testator is presumed to know what the law will be at his death and cannot rely absolutely on rules of construction in force when the will is written.

although the opinion seems to suggest that the provision would have been valid if it had been mandatory.³⁸ One case, not included in the six or two already mentioned, sustained the gift over where the testator had indirectly identified the present interest as a life estate, but the effect of these words was minimized in construing the whole will.³⁹

When viewed as a whole these cases are direct precedent for the conclusion that a remnant gift over will be sustained as a remainder in Kentucky even if the will does not expressly identify the first taker's interest as a life estate. But they are at best only indirect evidence as to whether the Kentucky Court would sustain a gift over after a fee on the grounds that a clearly intended remnant executory interest is valid. It is necessary, therefore, to examine the opinions in these cases to see if the Court has committed itself on this point through meaningful dictum.

The Hanks opinion itself is of little help on the precise point because the Court was concerned almost entirely with abandonment of the biting rule as the applicable rule of construction. The Hanks will gave testator's residuary estate to his wife:

. . . to be used, enjoyed and disposed of by her in any way she may choose with this provision however—that should any of said property . . . remain at the death of my said wife, the same shall be divided equally among Mallie Bledsoe, Louisa Hanks, John W. McDanell and Flora Wooley.⁴⁰

The Court enforced the gift over and held that the "polar star" rule should govern the construction of clearly expressed remnant gift intention unless it antagonizes a statute or is against public policy. No effort was made to define the use of the term public policy except in the context of the immediate problem. Apparently this immediate context was whether the biting rule of construction itself reflected a public policy against enforcing the gift over as a remainder after a life estate. The point is expressed as follows in the opinion:

To first vest one with a fee title, but in the same conveying instrument manifest an intent and purpose to

³⁸ *Swango v. Swango's Adm'r.*, 313 Ky. 495, 232 S.W. 2d 347 (1950).

³⁹ *Wiglesworth v. Smith*, 311 Ky. 366, 224 S.W. 2d 177 (1949).

⁴⁰ 307 Ky. 243, 244, 210 S.W. 2d 784, 785 (1948).

limit it to a life estate (even with power to encroach upon the corpus of the property) and then direct that if the first taker should die without appropriating for his personal benefit the entire property, the remnant thereof should go to others is not forbidden by any definition of public policy.⁴¹

If this language means what it says literally, the Hanks opinion stands only for the proposition that a remnant gift over is valid if it can take effect as a remainder after a life estate through construction of the will as a whole. If the difference between a remainder and an executory interest were merely a matter of form, one might argue with some confidence that the expression of view in the Hanks opinion is broad enough to mean that creation of a remnant executory interest is not against public policy. But as already demonstrated, the remainder and executory interest are fundamentally different in nature, in form, in origin and in historical treatment by the courts. Especially are they different as to the kind of present interest that can precede them and this is most important in assessing the Kentucky view, because as will be seen, the Court of Appeals has repeatedly refused to hold that the life tenant can have an unlimited, implied power to dispose in fee either *inter vivos* or by will without invalidating the gift over. Unless the first taker as life tenant has such power, his consuming life estate is in no sense the equivalent of fee ownership. It is, therefore, no mere matter of form to say that a gift over which takes effect as an executory interest after a fee is different from a gift over that takes effect as a remainder after a life estate coupled with a limited power to consume or dispose. The policy as to the latter is crystal clear while the policy as to the former is unrevealed. In essence this is all that can be said about Kentucky law based on the Hanks case, and this conclusion is the crux of the remnant gift problem. The testator in the Hanks will used language broad enough to suggest he intended his wife to have unlimited power of disposal, even by will, and that he intended the gift over to become effective only if this power was not exercised. By changing the traditional rule of construction and by slightly "rewriting" the will so it created a life estate coupled with a limited power of disposal,

⁴¹ *Id.* at 247, 210 S.W. 2d at 786. (Emphasis supplied).

the Court gave effect to the gift over. But was full legal effect given to all the testator's expressed intent? Can the intent underlying the Hanks will and expressed in it in unequivocal terms be given full legal effect without enforcing the gift over as a remnant executory interest?

Little is added to the picture by the opinions in *Jacobs v. Barnard*⁴² and *Stewart v. Morris*.⁴³ The former case, decided in the same term as *Hanks*, merely adopted the Hanks opinion, while the latter decision relates only to the prospective effect of Hanks already mentioned.⁴⁴

Wiglesworth v. Smith,⁴⁵ decided a year after *Hanks*, gives some additional insight on the problem although the will creating the remnant gift indirectly identified the first taker's interest as a life estate. The will gave residue to testator's wife during her lifetime "with the right to use any or all of the same if in her opinion it may be necessary for her support and maintenance."⁴⁶ A subsequent provision bequeathed and devised any remainder to named persons "if at the death of my wife she has not used and expended all of my estate." This clause of the will also contained the following assertion:

It is to be understood that this item is to be no restraint on my wife's use of my property but just in the event any remains at her death I make this provision because of the kindness and care they (the donees over) have shown toward my wife and myself.⁴⁷

The wife eventually decided that she needed to sell the principal assets of the estate, a sixty-two acre tract and a two acre tract of land, because the income therefrom was insufficient for her maintenance and support. She contracted to sell in fee, but the vendee refused to perform on the theory that she did not have power to sell without court approval. The Court sustained her right to convey in fee and required the vendee to perform, but not directly on the ground that she had an express life estate coupled with an express power to convey in fee. Rather they re-

⁴² 307 Ky. 321, 210 S.W. 2d 972 (1948).

⁴³ 313 Ky. 424, 231 S.W. 2d 70 (1950).

⁴⁴ See discussion, *supra*, p. 413, especially note 37.

⁴⁵ 311 Ky. 366, 224 S.W. 2d 177 (1949).

⁴⁶ 311 Ky. at 367, 224 S.W. 2d at 177. (Emphasis supplied).

⁴⁷ *Ibid.*

lied on the Hanks case and from a reading of the whole will concluded:

. . . it was the testator's intention that his widow should possess all the powers as to the use and appropriation of the real estate devised to her the same as that of an absolute fee owner *with the exception possibly that she could not dispose of the property by giving it away, or by . . . will.*⁴⁸

Again the Court leaves the critical question untouched. Would the gift over have been valid if the testator had without question intended to confer right of disposition through *inter vivos* gift and by will? Except for the equivocal and suggestive wording of the opinion, there is little in the case to point toward this conclusion. The quoted wording of the opinion may be slightly more indicative of a friendly attitude toward a remnant executory interest than anything in the Hanks case, but it falls short of a well considered statement of legal principle.

In some ways *Swango v. Swango's Adm'r.*⁴⁹ is the most interesting of the cases under consideration. Here testator gave all of his property to his wife "for her absolute use and benefit." He said expressly: "I want her to use the above to suit herself, to sell, trade or barter, or spend as she sees fit."⁵⁰ Following these provisions, he wrote "After my wife's death I desire the real and personal property, money if any, that may be left to be divided equally between my wife's and my heirs." Except for the precatory word "desire" appearing in the gift over clause, this was the perfect instrument to test the legality of the remnant executory interest. The express intent, both as to the nature of the present interest and the condition on which the gift over was created, could not have been clearer. Moreover, the wife had in fact exercised testamentary power over the remaining estate at her death and the issue in litigation was between her devisees and the donees over. The Court avoided the potential question and confined its construction problem to the legal effect of the particular word, desire, concluding it was not mandatory. On this ground they correctly decided that the gift over provision did not impair the first taker's fee. One statement in the Swango case

⁴⁸ 311 Ky. at 371, 224 S.W. 2d at 179. (Emphasis supplied).

⁴⁹ 313 Ky. 495, 232 S.W. 2d 347 (1950).

⁵⁰ 313 Ky. at 496, 232 S.W. 2d at 347.

is most revealing as to the Court's view of the Hanks decision. The Court said:

While this Court has repudiated the rule that where an absolute estate is devised, *subsequent provisions will not be held to impair that estate*, we still must seek out the true intention of the testator.⁵¹

Framing the Hanks rule as a rule relating to the *impairment* of the fee might suggest that the remnant gift over *must impair* the fee if it is to be valid. In this sense, the Swango opinion seems to confirm the idea that there is no policy against remnant gifts provided they can take effect as a remainder and provided further that the will as a whole is susceptible of an interpretation which permits this conclusion.

The Swango opinion ends with a remarkable bit of dictum that leaves the evaluation just made in doubt. The final paragraph asserts:

Reading the entire will, it is clear to us that the testator intended no legal or enforceable limitation on the estate left to his wife, *except possibly in the event she died without having disposed of a portion of it*. Since she had, by use and by will, appropriated it all, there was no remaining estate in which appellants could share.⁵²

Without intending to dance on the head of a pin, what could this dictum possibly mean, except that the remnant gift might have been enforceable if the first taker had died without having fully exercised her fee ownership. The final sentence quoted seems to say also that the remnant gift failed to take effect merely because there was no property left undisposed of. This is quite a different thing indeed from failing to give effect to a remnant gift over because it is precatory or because it would have to be sustained as an executory interest. If this closing remark in the Swango opinion is read out of context, it comes precious close to saying that a mandatory remnant gift over is enforceable even though the first taker has a fee which entitles her to dispose by will. This is, of course, too precarious a basis on which to classify the opinion. The Court probably was not conceptualizing the problem as it is conceptualized here when the particular words were

⁵¹ *Id.* at 497, 232 S.W. 2d at 348.

⁵² *Ibid.* (Emphasis added).

written. And nothing else in the opinion suggests that the Court intended to expand the doctrine of the Hanks case. Thus when read in context the particular statement probably stands only for the fact that the Court was considering all possible interpretations of the instrument in the process of arriving at its final construction. Even on this basis, the Swango case is of value because it shows that the executory interest relationalization might get due consideration if properly presented to the Court as a method for resolving the construction dilemma inherent in all remnant gift wills.

Perhaps the most difficult Kentucky case to classify is *Hall v. Hall* decided in 1951.⁵³ Here the will was homemade and simply provided:

This is my will. I am in good health and sound mind. I want my wife Lena R. Hall if she is the longest liver to have all my belongings and at her death if my brothers Bert Hall and Tom Hall are still living it can be divided between the two families, and if Lena R. Hall wants to make any changes she is at liberty to do so.⁵⁴

In a suit for construction of the will, the Chancellor held that the wife was given the possession, management, control and right of disposition of the property during her life time, including "the right to dispose of any and all of said property by will." The Chancellor also held that if the first taker should die without a will disposing of all or any part of the estate, the portion remaining at that time should go to Bert Hall under the will, but if he should predecease Lena R. Hall, the remaining portion should pass under the laws of descent and distribution to the heirs of Lena R. Hall.

The wording of the trial court judgment in the Hall case is so clear it can only be interpreted as having established absolute ownership in the first taker subject to a valid gift over if the first taker failed to dispose by will and if the donee over was then alive. The Chancellor's description of the rights held by the first taker and his interpretation that the property should go to her heirs by descent if the gift over did not vest show unmistakably that the wife owned the property in fee. It necessarily follows,

⁵³ 314 Ky. 733, 237 S.W. 2d 55 (1951).

⁵⁴ *Id.* at 733, 237 S.W. 2d at 55.

therefore, that the donee over had a valid remnant executory interest contingent upon his survival of the first taker and also contingent upon her failure to dispose by will. This was an amazing decision by the trial court in view of the case law already reviewed in this discussion, but on appeal the Court of Appeals chose to dispose of the case in one short paragraph. Seemingly with little realization of the implications involved, the Court said only this:

We think the Chancellor properly disposed of the case. Mr. Hall's intent is gathered readily from the one sentence in which he disposed of his estate. The case comes clearly within the scope of the opinion in the case of *Berner v. Luckett*.⁵⁵

Interestingly enough, *Berner v. Luckett*⁵⁶ was decided three years before the Hanks case, and it is most difficult to see how the Court's opinion in this case would govern the Hall will, especially in view of the interpretation given it by the Chancellor below. The will in the Berner case was an elaborate instrument, one clause of which purported to create a fee in the first taker, but all other provisions of which suggested the present interest should be a life estate only. The Hall will was a simple instrument which the trial Chancellor interpreted as creating a fee in the first taker. In *Berner* the appellate court sustained the gift over on the ground that the whole will showed testator did not intend to give his wife an absolute fee with unlimited power of disposition. In *Hall* the trial court judgment expressly identified the wife's right as that of a fee owner with power to dispose by will. The two cases are completely dissimilar except for the broad principle that testator's intent should be derived from reading the whole will. The opinion in the Berner case emphasized this point although the court was unwilling to apply it to a remnant gift over as such until the Hanks case. It is impossible to tell whether the Court was referring to this broad principle when it sustained the Chancellor's finding in the Hall case merely by referring to the scope of its opinion in the Berner case. If so, the Hall opinion, cryptic though it is, could stand for the proposition that testator's intent as expressed in the whole will must be given effect even

⁵⁵ *Id.* at 734, 237 S.W. 2d at 56.

⁵⁶ 299 Ky. 744, 186 S.W. 2d 205 (1945).

if the remnant gift over has to take effect as an executory interest. One cannot escape the feeling, however, that the Hall case leaves unanswered more than one basic question. Must the remnant gift over take effect as a remainder as a matter of policy? Did the Court in this case, for instance, mean that the Chancellor had properly interpreted the will by construing it to create a life estate coupled with an unlimited power of encroachment and disposition? Was the Hall will governed by the Berner opinion because it created a remainder after a life estate even though the life tenant had power of testamentary disposition? In sustaining the Chancellor, was the Court trying to draw some distinction between a present fee simple and a life estate coupled with a general power of appointment in so far as validity of the gift over is concerned?

The Berner opinion also distinguished carefully between a *remnant* gift over after a fee and a gift over of the *whole* estate after a fee. It classified the former as void because the biting rule of construction had not yet been abandoned, but it classified the latter as valid because such a provision necessarily reduces the first taker's interest to a life estate. As will be seen subsequently, this distinction has been mentioned more recently, but it would seem to be of little help in reconciling the Berner and Hall cases because there is nothing in the Hall opinion to suggest that the judgment below was sustained on the theory that the present interest was necessarily a life estate. At best the two cases are simply additional evidence of the fact that the Court has neglected to fully rationalize its position on remnant gift provisions due in no small part to its purely constructional approach.

Letting the validity of each remnant gift over turn on an interpretation of the particular will may be sound from the constructional viewpoint, but it requires the drawing of rather fine distinctions as to the meaning of strikingly similar provisions. *Weakley v. Weakley*⁵⁷ is an excellent illustration of this technique. The holographic will in this case read:

I leave all real estate and personal property to my beloved son, . . . to do with as he sees fit. Then goes to my grandchildren at his death to share alike.⁵⁸

⁵⁷ 237 S.W. 2d 524 (Ky. 1951).

⁵⁸ *Id.* at 525.

In sustaining the gift over, the court said that the Hanks case in no way disturbed the rule of construction where there is a gift over of the whole estate because such gift has always created a life estate in the first taker. The Berner case and *Price v. Price*⁵⁹ were cited in support of this position, and the court made a point of declaring that the only effect of the Hanks case was to eliminate the conclusive presumption of voidness in the case of a remnant gift over. The Price case had held, however, that a gift over of the whole estate revealed an intention that the first taker, as life tenant, should not have power to encroach on corpus. Phrases and words that seemed to confer such power were construed to refer only to the life estate itself and not to the corpus.

Thus prior to the Hanks case and the Weakley case, the Court's formula was easy to apply. If there was a purported fee followed by a gift over of the remnant, the gift over was void. If there was a purported fee followed by a gift over of the whole estate, the gift over was valid because a life estate without power to encroach was created in the first taker. Either interpretation was based on a reading of the whole will, but the decisive factor was the extent of the gift over or what might be called the words used to identify the subject matter of the future interest. The first part of this formula was clearly repudiated in the Hanks case and the second part was severely modified in the Weakley opinion.

The express authorization in the Weakley will that the first taker was to do with the property "as he sees fit" convinced the Court that a power to encroach was intended. They reconsidered this aspect of the Price opinion and repudiated it on the ground that such phrases could only refer to power over the corpus since all other rights of the present owner were fixed by the nature of his life estate. For no apparent reason, however, the Weakley opinion limited its rationalization to this particular point and made no affirmative attempt to define the scope of the life tenant's power. The trial Chancellor had decreed that the first taker had full power to dispose by sale or encumbrance, or expenditure. He also decreed that the gift over should extend to any property remaining undisposed of at the death of the first

⁵⁹ 298 Ky. 608, 183 S.W. 2d 652 (1944).

taker. This judgment was affirmed without comment other than that already described.

When taken together, the Hanks case and the Weakley case seem to destroy the practical distinction between a remnant gift and a gift of the entire estate. The former by its terms extends only to the property not disposed of by the first taker and the latter becomes possessory in the remnant only, because the life tenant has power to encroach. Both cases sustain the gift over on the theory that the first taker's interest is less than a fee although the Hanks doctrine is not nearly so clear on this point as the Weakley case and cases similar to it. Both cases leave undefined the scope of the first taker's power to dispose and thus leave unresolved the ultimate question: is the gift over valid *only* because the first taker's right can be explained as a life estate coupled with a completely unlimited power to dispose?

The scope of the first taker's power to dispose was more precisely defined in *Collings v. Collings Ex'rs.*, decided two years after the Weakley case.⁶⁰ This opinion also contains an excellent general summary of the court's view on remnant gifts over, taking into account the many and varied decisions it has rendered through the years. Certain specific points that the Court chose to clarify in this case should be mentioned. First, two controlling principles have emerged from the cases: (1) The pivotal question in every case is whether the first taker receives a fee or a life estate and one test is whether he was given the unlimited power of disposition. (2) The intention of testator as gathered from the whole will is to control. Second, the court abandoned long ago the rigid and harsh common law rule that it is legally impossible by subsequent clauses to qualify or limit the phrases in prior clauses appropriate to create an apparent fee. Third, the Hanks case means that a remnant gift over is no longer conclusively presumed to be void and the Berner case means that the gift over may serve to define the estate of the first taker as a life estate. Fourth, whether the first taker has a life estate or a fee depends on whether testator invested him with power to deed and to devise in fee simple all of the property embraced in the will.

These then are the controlling principles, presumably for the draftsman as well as the court. But what of the notion that the

⁶⁰ 260 S.W. 2d 935 (Ky. 1953); noted 42 Ky. L.J. 717 (1954).

instrument can create a fee in the first taker provided the gift over takes effect as a remnant executory interest. This rationalization is conspicuously absent in the court's fully considered statement of legal doctrine. In most of the prior cases one could say that the court was more concerned with construction than with doctrine, but this is hardly a tenable evaluation of the Collings case. Here the court fully evaluates its own precedent and finds nothing in it to suggest that a remnant gift can take effect except as a remainder after a life estate. The conclusion is inescapable that this is an accurate and authoritative conclusion as to the state of Kentucky law.

The failure of this rationalization to resolve adequately the construction problem presented by remnant gift provisions is beautifully illustrated in the Collings case itself, because when the court came to apply its first and second principles in the face of the plain meaning of the will, it was necessary to define the scope of the first taker's power to dispose through implication. The particular will in one clause gave all of the property to testator's wife and in the next clause provided:

Any part of my estate remaining undisposed of at the time of the death of my said wife, I will and bequeath to my cousin, Lowell Anderson Collings. Should he not survive her, then to his descendants (sic), if he leaves any, and if not, to my heirs at law.⁶¹

The widow and executors contended the two clauses created a fee simple absolute in her with no gift over. The donee over maintained she took only a life estate with limited power to dispose and use for her benefit during her lifetime. The court was quick to realize that its "power to will" test was not too helpful in resolving this issue since the instrument was not express on this point. Since this is the ultimate test, however, the implied intention of the testator with respect to the matter must be determined. The court was equal to the task, however, and pointed out that in this will:

It is unmistakably clear under the fourth clause that the widow cannot dispose of the remainder of the estate by will *because the testator not only reserved this right exclusively to himself, but he has already fully exercised it.*⁶²

⁶¹ *Id.* at 936.

⁶² *Id.* at 937. (Emphasis supplied).

This remarkable assertion shows beyond question that the Court takes the gift over provision as the best evidence of testator's intention *not* to confer power of testamentary disposal on the first taker. *A fortiori*, the present interest is necessarily a life estate and the future interest is necessarily a remainder. This conclusion requires further implication as to the extent of the life tenant's limited power to consume and dispose. On this point also, the Court was equal to the task in the Collings case and concluded that testator's widow had "all right as to the use and enjoyment of the estate during her natural life; *nevertheless, she may not willfully waste it, nor give it away, nor dispose of it by will.*"⁶³

The emphasized qualifications or limits placed on the first taker's power were pure implication in the Collings case unless they too result from the gift over provision, because the relevant clause of the will describing the widow's rights was completely silent on the matter. All the testator said there was: "All . . . of my estate I will, devise and bequeath to my beloved wife."⁶⁴ For some reason, the court did not explain or elaborate its reasons for concluding that the first taker cannot willfully waste or give the property away. Perhaps it was influenced by the absence of words in the instrument affirmatively conferring a right to do with the property "as he sees fit." In any event the court clearly described the limited power that will be implied where there is a gift over after a purported fee and nothing more.

This view has been expressly confirmed in *St. Joseph Hospital v. Dwertman*,⁶⁵ decided in 1954 and the last of the nine cases under consideration. The will in this case was not as simple as the typical instrument creating a true remnant gift over, since it provided for a joint estate with right of survivorship in two first takers and made the future interest over contingent on the death of one of them without issue. This required the Court to de-

⁶³ *Ibid.* (Emphasis supplied).

⁶⁴ *Ibid.* Appellees argued that this clause when read alone created a fee because of K.R.S. 381.060, the statute abolishing words of inheritance. The Court conceded that the statute did dispense with this requirement, but pointed out that the statute did not change the rule that where there are words indicating intent they will nevertheless govern. The Court seemed to take it for granted that this *intent* should be derived from the whole instrument and not from the particular clause only. This also confirms the point made directly in the text that the gift over provision is the best evidence that no fee was intended.

⁶⁵ 268 S.W. 2d 646 (Ky. 1954).

termine whether the present interest was a fee, and if so whether it was defeasible on death without issue before the testator's death or whether the happening of this condition would divest the fee whenever it occurred. As has been adequately described elsewhere,⁶⁶ the court rejected this "substitutional construction" and upheld the gift over to certain charities. One clause in the will provided, however, "I want my wife and daughter to enjoy the full benefit of my estate during their lifetime." The Chancellor below construed this phrase to mean that the first takers (as joint life tenants with survivorship) had the unlimited right of disposition of the corpus except by will. The charitable donees over appealed on the ground, *inter alia*, that the particular clause could not be construed to authorize encroachment. The Court took a middle view consistent with its position in the Collings case, a position already decided but not announced since the opinion in that case was not published until after the Chancellor's finding in this case.

The court conceded that the earlier provisions of the will devised and bequeathed the estate outright in fee simple to the first takers, but said the later provisions did two things: (1) reduced the fee to a life estate and (2) showed an intention for the life tenants to have the *full benefit* of testator's estate and not merely the full benefit of their life estate. The Court also said it would seem appropriate to characterize such an interest as a "consuming life estate," and further that "its true nature *and the limitations upon the right of disposition appear in*" the Collings opinion.⁶⁷

Thus it seems quite clear that a remnant gift over in Kentucky takes effect as a remainder after a "consuming life estate" if at all and that the gift over provision itself shows a testamentary intent for the life tenant's power of disposal to be so limited that he cannot willfully waste it or give it away or dispose of it by will.

⁶⁶ Matthews, *Kentucky Developments in 1954: Personal and Real Property, Future Interests and Trusts*, 44 Ky. L.J. 37, at 49 and 55 (1955).

⁶⁷ 268 S.W. 2d at 648.

CONCLUSION

The constructional nature of the remnant gift problem, the traditional legal doctrine inhibiting its solution, and the recent experience of the Kentucky Court in construing these wills all suggest that a new look at the true nature of the remnant gift over as a future interest is needed. A look needed in most jurisdictions, one might add.

Enforcing such provisions as remnant executory interests conditioned on failure of the fee owner to dispose *inter vivos* or by will clearly is the best solution from the constructional viewpoint, the doctrinal viewpoint and the drafting viewpoint. And even more important, as described in greater detail in Part I of this discussion,⁶⁸ this interpretation permits full legal effect to be given to the unequivocally expressed intent of the testator, even the testator who writes his own will without knowing the elaborate apparatus provided by existing law for approximating his wishes.

Although a tenuous argument can be made that the executory interest solution is possible under the present view of the Kentucky Court, it surely would be better for the Court to review its position and its previous decisions at the first appropriate opportunity and to decide directly whether a true remnant executory interest is invalid either as a matter of construction or as a matter of policy.

⁶⁸ See discussion, *supra*, pp. 407 and 408.